

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANETTE N. VANGORP

Claimant

VS.

FORDYCE CONCRETE COMPANY, INC.

Respondent

Self Insured

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Docket No. 220,401

ORDER

Respondent appeals from an Award and Nunc Pro Tunc entered by Administrative Law Judge Robert H. Foerschler on October 22, 1999. The Appeals Board heard oral argument on April 26, 2000.

APPEARANCES

Davy C. Walker of Kansas City, Kansas, appeared on behalf of claimant. Frederick J. Greenbaum of Kansas City, Kansas, appeared on behalf of respondent.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed during oral argument to the Board that all exhibits offered at the May 1, 1997 Preliminary Hearing should be considered as part of the record without objection to medical hearsay.

ISSUES

What is the nature and extent of claimant's disability?

The Award grants claimant an 18 percent permanent partial general disability based on a split of the ratings, but adopts the causation opinions of the claimant's expert, Ronald Zipper, D.O., who was the only expert to relate claimant's back and carpal tunnel syndrome conditions to the March 20, 1996 accident. The court ordered independent examiner, orthopedic surgeon Don B. W. Miskew, M.D., initially assessed a 2 percent permanent partial impairment rating to the right upper extremity, but did not assign any permanent impairment to the back because he did not find the back to be causally related to the accident. The parties nevertheless requested a rating for the back from Dr. Miskew who then gave a 7 percent rating to the back as a result of the spondylolysis and

spondylolisthesis. On appeal, respondent contends claimant is entitled to a permanent disability award for a scheduled injury to the right arm only or, if there is a permanent impairment to the back, then the award should be based on the rating by the court ordered examining physician, Dr. Miskew, because the ratings by Dr. Zipper are excessive. As claimant has returned to work with the respondent earning a wage greater than her average weekly wage at the time of her accident, there is no claim for a work disability.

Claimant raises no additional issues, contending the Award entered by the ALJ should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to award a 2 percent loss of use of the right arm.

The parties agree that claimant suffered accidental injury arising out of and in the course of her employment with respondent. The dispute centers upon whether, in addition to the fracture of the right elbow, claimant also suffered permanent impairment to her right wrist and back. Following an appeal from the May 7, 1997 Preliminary Decision by Judge Foerschler, the Appeals Board found as follows:

On March 20, 1996, claimant fell approximately 12 feet to the ground from the concrete truck which she was washing. Claimant landed in the fetal position on her right side and fractured her right wrist and elbow. The fall also caused a large bruise on claimant's right hip and buttocks.

The respondent selected Dr. James Reardon to treat claimant, which he did through June 22, 1996. In April 1996, claimant returned to work for respondent driving a mail car for three or four hours per day. After the doctor released claimant to return to work without restrictions on June 22, 1996, claimant returned to work for the respondent and her regular job duties as a concrete truck driver.

Approximately two weeks after returning to her regular job duties, claimant first began to experience symptoms in her left hip and leg. Other than the bruise on her buttocks, claimant did not have any low back or leg symptoms during the months of March, April, May, and June 1996. Claimant testified that once the low back and lower extremity symptoms began they progressively worsened and she requested a transfer to a dump truck. She also testified her symptoms progressively worsened to the point she was unable to climb, stand, or walk.

In August 1996, claimant sought medical treatment on her own at North Kansas City Hospital with low back, left hip, left leg and foot

complaints. The hospital ordered an MRI of the lumbar spine and referred claimant to Arthur Jenny, M.D., who treated claimant with epidural steroid injections. Claimant saw Dr. Jenny on two occasions, the last being in September 1996. Claimant testified that Dr. Jenny recommended back surgery and that he did not believe claimant's back complaints were related to the March 1996 accident.

At claimant's attorney's request, board-certified orthopedic surgeon Ronald Zipper, D.O., examined and evaluated claimant in December 1996. He diagnosed "L5-S1 radiculopathy of the left lower extremity, consistent with a herniated disc at L4-5 or above" and "symptomatic spondylolisthesis and facet hypertrophy." Dr. Zipper attributes claimant's present symptomatology to the March 20, 1996, fall. In his initial letter to claimant's attorney, the doctor noted it was not unusual to see discogenic problems develop over a period of time.

Respondent introduced medical notes from Arthur B. Jenny, M.D. The notes dated August 9, 1996, contain the history that claimant's low back, hip, and leg pain began around August 1, 1996, while she was cooking dinner and that her full radiculopathy developed over the next three or four days. Claimant denies she gave that history and believes the person who recorded it was confused.

After considering the record assembled to date, the Appeals Board agrees with the Administrative Law Judge's conclusion that claimant has failed to prove her back complaints are related to the March 20, 1996, work-related accident. The Appeals Board finds the complete absence of low back and leg symptoms until sometime in July 1996, as claimant now alleges, is very significant and has not been adequately explained if, indeed, the symptoms are related to the fall at work.¹

At that time the record included claimant's preliminary hearing testimony and medical records and/or reports from Carl A. Foster, M.D., North Kansas City Hospital, Michael J. Nelson, M.D., Arthur B. Jenny, M.D., James P. Reardon, M.D., and Ronald Zipper, D.O. The record developed since that preliminary hearing includes claimant's Regular Hearing testimony, the testimony of claimant's expert, Dr. Zipper, and the testimony of the court-ordered independent medical examiner, Dr. Miskew. The Board finds the testimony of Dr. Miskew to be the more credible and persuasive evidence on causation and permanent impairment. The Appeals Board adopts the opinions of Dr. Miskew and finds claimant has proven a 2 percent loss of use of her right arm due to the elbow injury, but has not proven any additional permanent impairment resulting from

¹ WCAB Order dated June 30, 1997.

the injury to her wrist. Furthermore, the Appeals Board finds that neither the carpal tunnel syndrome condition nor the condition in claimant's low back were caused by the March 20, 1996 accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award and Nunc Pro Tunc entered by Administrative Law Judge Robert H. Foerschler dated October 22, 1999, should be, and is hereby, modified as follow:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Janette N. VanGorp, and against the respondent, Fordyce Concrete Company, Inc., a qualified self insured, for an accidental injury which occurred March 20, 1996, for 3.14 weeks of temporary total disability compensation at the maximum rate of \$326.00 per week or \$1,023.64, followed by 4.14 weeks at the rate of \$326.00 per week or \$1,349.64, for a 2% scheduled injury to the arm, making a total award of \$2,373.28 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Davy C. Walker, Kansas City, KS
Frederick J. Greenbaum, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director